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2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 GREGORY BENDER,

7 Plaintiff,

8 vs.

9 MOTOROLA, INC., a Delaware corporation,

10 Defendant.

Case No: C 09-1245 SBA

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Docket 11

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12 This is a patent infringement action brought by Plaintiff Gregory Bender against
13 Defendant Motorola, Inc., based on its alleged infringement of United States Patent No.
14 5,103,188 (the '188 Patent). The Court has jurisdiction pursuant to 28 U.S.C. § 1331. The
15 parties are presently before the Court on Motorola Inc.'s Rule 12(b)(6) Motion to Dismiss
16 Gregory Bender's Amended Complaint for Failure to State a Claim. Having read and
17 considered the papers filed in connection with this matter and being fully informed, the Court
18 hereby GRANTS the motion and dismisses the Amended Complaint with leave to amend for
19 the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution
20 without oral argument. See Fed.R.Civ.P. 78(b).

21 **I. BACKGROUND**

22 On April 9, 1992, the United States Patent and Trademark Office issued the '188 Patent
23 to Plaintiff for an invention entitled "Buffered Transconductance Amplifier." Am. Compl. ¶ 6.
24 On May 14, 2009, Plaintiff filed an Amended Complaint accusing Defendant of infringing and
25 inducing others to infringe Claims 8-14 and 29- 46 of the '188 Patent. Id. ¶ 8.¹ The Amended
26 Complaint fails to specify any particular accused devices, and instead, simply alleges that

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28 ¹ The instant case is one of at least two dozen cases filed by Plaintiff based on the
alleged infringement of the '188 Patent.

1 broad categories of Defendant's products are infringing. Id. Plaintiff vaguely identifies the
2 allegedly infringing devices as "products [including], without limitation, cell phones,
3 computers, network drivers, high definition television sets, ultrasound machines, MRI
4 machines, lab equipment, arbitrary waveform generators, audio amplifiers, video amplifiers,
5 hard disc drives, ADC/DAC converters, DVD-RW players, DSL modems, CCD cameras,
6 satellite communication technology, and other products where high performance, high speed
7 analog circuits are used, and/or components thereof." Id.

8 In response to the Amended Complaint, Defendant filed a motion to dismiss pursuant to
9 Federal Rule of Civil Procedure 12(b)(6) on the ground that the Amended Complaint fails to
10 identify any particular accused devices or any facts to support his claim of inducement to
11 infringe. The motion has been fully briefed and is now ripe for adjudication.

12 **II. LEGAL STANDARD**

13 Rule 8 of the Federal Rules of Civil Procedure requires that a complaint contain a "short
14 and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P.
15 8(a)(2). If a complaint fails to satisfy Rule 8, it "must be dismissed" under Rule 12(b)(6) for
16 failure to state a claim upon which relief can be granted. Bell Atl. Corp. v. Twombly, 550 U.S.
17 544, 570 (2007). To survive a motion to dismiss, the plaintiff must allege "enough facts to
18 state a claim to relief that is plausible on its face." Id. The pleadings must "give the defendant
19 fair notice of what . . . the claim is and the grounds upon which it rests." Erickson v. Pardus,
20 551 U.S. 89, 93 (2007) (internal quotation marks omitted). "[A] plaintiff's obligation to
21 provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions,
22 and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550
23 U.S. at 555.

24 When considering a motion to dismiss under Rule 12(b)(6), a court must take the
25 allegations as true and construe them in the light most favorable to plaintiff. See Leatherman
26 v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993).
27 However, "the tenet that a court must accept as true all of the allegations contained in a
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complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, -- U.S. ---, 129 S.Ct. 1937, 1949-50 (2009). “While legal conclusions can provide the complaint’s framework, they must be supported by factual allegations.” Id. at 1950. Those facts must be sufficient to push the claims “across the line from conceivable to plausible[.]” Id. at 1951 (quoting Twombly, 550 U.S. at 557). In the event dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. See Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005); Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002).

III. DISCUSSION

Direct infringement claims are governed by 35 U.S.C. § 271(a), which states, “whoever without authority makes, uses, offers to sell, or sells any patented invention . . . during the term of the patent therefor, infringes the patent.” Form 18 in the Appendix to the Federal Rules of Civil Procedure provides a sample complaint for direct patent infringement. See also Fed.R.Civ.P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”). The form instructs a plaintiff to include:

1) an allegation of jurisdiction; 2) a statement that the plaintiff owns the patent; 3) a statement that defendant has been infringing the patent “by making, selling, and using [*the device*] embodying the patent”; 4) a statement that the plaintiff has given the defendant notice of its infringement; and 5) a demand for an injunction and damages.

McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1357 (Fed. Cir. 2007) (emphasis added); but see Elan Microelecs. Corp. v. Apple, Inc., 2009 WL 2972374 at *2 (N.D. Cal., Sept. 14, 2009) (questioning whether Form 18 comports with Twombly and Iqbal).

The Federal Circuit has not directly addressed the requisite level of factual detail to maintain a claim for patent infringement. In McZeal, a case decided after Twombly but prior to Iqbal, the Federal Circuit found sufficient a *pro se* plaintiff’s complaint which alleged (1) plaintiff’s ownership of the patent in suit, (2) the “means by which” the defendant allegedly infringed the patent, and (3) the particular device manufactured and distributed by defendant at

1 issue, i.e., the “Motorola i930.” Id. The court held that in light of the “low bar for *pro se*
2 litigants to avoid dismissal,” such allegations contained “enough detail to allow the defendants
3 to answer and thus meets the notice pleading required to survive a Rule 12(b)(6) motion.” Id.
4 The court noted, however, that “a plaintiff is not required to specifically include each element
5 of the claims of the asserted patent.” Id. at 1357-1358.

6 Here, the Amended Complaint is too conclusory to provide “fair notice” of the basis of
7 Plaintiff’s claim that Defendant infringed the ‘188 Patent. Nowhere in the Amended
8 Complaint does Plaintiff identify, with the requisite level of factual detail, the particular
9 product or line of products, that allegedly infringe the ‘188 Patent. Instead, Plaintiff merely
10 claims that the infringing “products include, *without limitation*, cell phones, computers,
11 network drivers, high definition television sets, ultrasound machines, MRI machines, lab
12 equipment, arbitrary waveform generators, audio amplifiers, video amplifiers, hard disc drives,
13 ADC/DAC converters, DVD-RW players, DSL modems, CCD cameras, satellite
14 communication technology, and other products where high performance, high speed analog
15 circuits are used, and/or components thereof.” Am. Compl. ¶ 8 (emphasis added). Plaintiff has
16 done nothing more than recite a laundry list of electronic devices. These cursory allegations
17 are insufficient to give the Defendant fair notice of the claims being alleged against it.

18 Plaintiff argues that his Amended Complaint provides all the information required in
19 Form 18. Pl.’s Opp’n at 6-8. This contention lacks merit. The form contemplates that the
20 pleader identify the accused device with some semblance of specificity to alert the alleged
21 infringer which device is at issue. It does not contemplate that the accused device or devices
22 be described in terms of a multiplicity of generically-described product lines such as “satellite
23 communications technology” and “audio amplifiers,” as Plaintiff has done here. Am. Compl.
24 ¶ 8. Likewise misplaced is Plaintiff’s reliance Judge Marilyn Hall Patel’s decision in Bender v.
25 Broadcom Corp., 2009 WL 3571286 (N.D. Cal., Oct. 30, 2009) in which she ostensibly
26 allowed him to allege infringement based “on a large number of a defendant’s various product
27 lines” Pl.’s Opp’n at 9-10. However, Plaintiff ignores that, unlike here, the complaint in
28 that case actually identified specific accused devices. Bender, 2009 WL 3571286 at *4 n.4;

1 Schmid Decl. Ex. B at 3, 6-7. Even then, Judge Patel made a point of noting that “[t]he listing
2 provided by plaintiff is (barely) adequate” Bender, 2009 WL 3571286 at *4.

3 Equally misplaced is Plaintiff’s reliance on McZeal, which Plaintiff contends “reaffirms
4 the continued and current validity of Form 18.” Pl.’s Opp’n at 8. Setting aside that Plaintiff
5 has *not* met the pleading requirements of Form 18, Plaintiff reads too much into McZeal.
6 Though referring the elements of Form 18 (then Form 16) in passing, the court did, not as
7 Plaintiff claims, reaffirm the validity of the form. McZeal, 501 F.3d at 1356-57. Rather, the
8 court simply held that a patent infringement plaintiff “is not required to specifically include
9 each element of the claims of the asserted patent.” Id. at 1357. Moreover, unlike this case, the
10 *pro se* plaintiff in McZeal had, in fact, identified the infringing devices as the “MOTOROLA
11 i930 and the line of wireless VoIP [voice over internet protocol] products” McZeal, 501
12 F.3d at 1357. Based on that description, the defendant in McZeal had fair notice “as to what he
13 must defend.” Id. In contrast, Plaintiff’s generic descriptions of a litany of electronic products
14 are far too conclusory to pass muster under Rule 8, Twombly or Iqbal.²

15 Even if Plaintiff’s allegations adequately afforded Defendant with fair notice of the
16 products that purportedly infringe the ‘188 Patent—which they clearly do not—the Amended
17 Complaint is subject to dismissal with respect to Plaintiff’s claim of induced infringement.
18 Am. Compl. ¶ 8. “In order to prevail on an inducement claim, the patentee must establish first
19 that there has been direct infringement, and second that the alleged infringer knowingly
20 induced infringement and possessed specific intent to encourage another’s infringement.”
21 ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd., 501 F.3d 1307, 1312 (Fed. Cir. 2007)
22 (internal quotations and citation omitted). Here, Plaintiff fails to allege any facts consistent
23 with the foregoing. Instead, the Amended Complaint alleges *only* that Defendant “performed
24 acts . . . that infringe and *induce others to infringe*” Id. (emphasis added). This
25 conclusory, fact-barren allegation fails to state a claim for inducement to infringe under 35

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28 ² The Court notes that the a draft Second Amended Complaint attached to Plaintiff’s
opposition is insufficient to cure the deficiencies discussed in this Order.

1 U.S.C. § 271(b). Accordingly, the Court grants Defendant's motion to dismiss based on
2 Plaintiff's deficient allegations of inducement to infringe.

3 **IV. CONCLUSION**

4 For the reasons stated above,

5 IT IS HEREBY ORDERED THAT:

6 1. Motorola Inc.'s Rule 12(b)(6) Motion to Dismiss Gregory Bender's Amended
7 Complaint for Failure to State a Claim is GRANTED. Plaintiff shall have five (5) days from the
8 date this Order is filed to file a Second Amended Complaint that cures the deficiencies discussed
9 above. Defendant's response to the Second Amended Complaint shall be due fourteen (14) days
10 thereafter. Plaintiff is warned that the failure to file a Second Amended Complaint within the
11 specified time period will result in the dismissal of this action, with prejudice.

12 2. The Case Management Conference currently scheduled for March 2, 2010 shall
13 be CONTINUED to **April 14, 2010 at 3:30 p.m.** The parties shall meet and confer prior to the
14 conference and shall prepare a joint Case Management Conference Statement which shall be
15 filed no later than ten (10) days prior to the Case Management Conference that complies with
16 the Standing Order for All Judges of the Northern District of California and the Standing Order
17 of this Court. Plaintiff shall be responsible for filing the statement as well as for arranging the
18 conference call. All parties shall be on the line and shall call (510) 637-3559 at the above
19 indicated date and time.

20 3. Within fourteen (14) days of the date this Order is filed, Plaintiff shall comply
21 with his obligations regarding Disclosure of Asserted Claims and Infringement Contentions
22 under Patent Local Rule 3-1 and Rule 3-2. The deadline for Defendant's Invalidity
23 Contentions under Patent Local Rule 3-3 and 3-4 shall be in accordance with deadline specified
24 in Rule 3-3. Discovery may commence as of the date of this Order is filed.

25 4. This Order terminates Docket 11.

26 IT IS SO ORDERED.

27 Dated: February 26, 2010

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SAUNDRA BROWN ARMSTRONG
United States District Judge